Petition

81-1648

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ALEXANDER L. STEVAS,
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No.

In the Supreme Court of the United States

October Term, 1982

CLARENCE STEWART ANDERSON,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ANDREW J. ACHMAN
SALLY A. FRICK

308 Frick Building
Pittsburgh, PA 15219
412/261-3340

Attorneys for Petitioner

March 5, 1982

Financial Press Corporation, Pittsburgh

QUESTIONS PRESENTED

1. Whether Petitioner was denied his Sixth Amendment right to confrontation of witnesses against him by the trial court's denial of production of the informant, where the information provided by the informant was directly contradicted by other testimony.

2. Whether Petitioner was denied his Sixth Amendment right to effective assistance of counsel:

A. Where original counsel had a conflict of interest and possessed exculpatory information, neither of which were disclosed to Petitioner; and,

B. Where trial counsel failed to fully investigate and discover a witness who possessed information favorable to the defense.

3. Whether Petitioner was denied his Fifth Amendment right to due process of law by the trial court's refusal to provide judicial immunity to a witness with evidence favorable to the Petitioner.

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Petitioner Clarence Stewart Anderson respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on January 4, 1982.

JUDGMENT BELOW

The judgment order of the Court of Appeals appears at *United States v. Anderson,* F.2d (3d Cir. 1981), No. 81-1415 and in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on December 3, 1981. A timely petition for rehearing was denied on January 4, 1982, and this Petition for Writ of Certiorari is being filed within sixty (60) days of that date of denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall...be deprived of life, liberty or property, without due process of law..."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for this defense."

STATEMENT OF THE CASE

Petitioner was indicted in the United States District Court for the Western District of Pennsylvania on January 18, 1979

and charged with possession with intent to deliver a controlled substance in violation of 21 U.S.C., Section 841(a)(1). Petitioner and one Lucas Boxley were arrested on November 23, 1977 by city of Pittsburgh detectives and both were charged with violations of the criminal statutes of the Commonwealth of Pennsylvania in connection with a quantity of heroin which was retrieved from the automobile in which they were riding, and in which Petitioner was a passenger. These same charges gave rise to the indictment in the United States District Court, and the state charges were nolle prossed by the Commonwealth of Pennsylvania on January 19, 1979.

The arresting officer testified that a known informant flagged down he and his partner on November 23, 1977, and told them that the Petitioner was at the Hilltop Lounge in the city of Pittsburgh with a large quantity of "mex." Pursuant to that information, detectives proceeded toward the Hilltop Lounge where they observed Petitioner standing on the street behind a silver Cadillac. They then observed Petitioner cross the street and enter Boxley's vehicle. The detectives followed that vehicle for several blocks, stopped the vehicle and found inside the vehicle a quantity of heroin. Boxley was never indicted for this offense because he passed away soon after his and Petitioner's arrest in November, 1977.

Subsequent to the arrest in this case, Petitioner was represented by Attorney J. Roi Jones and Boxley was initially represented by Attorney Allen Brunwasser. After Boxley's death, Attorney Brunwasser then represented Petitioner. Both attorneys stated that Boxley had made statements to them that Petitioner was not aware, or in possession of, the heroin found in Boxley's car, and, further, Boxley stated to Attorney Jones that he had "just picked it up." Attorney Brunwasser represented Petitioner until such time as the district court advised him that, if he were a witness in this case, he could not represent Petitioner; his exculpatory information was not disclosed at

any time prior to indictment or to pre-trial proceedings in the district court.

Petitioner requested, on several occasions, disclosure of the informant. The district court inquired of the detective, *in camera,* concerning the informant's existence, but only the first name and a physical description were disclosed to the district court; the detective did not know the informant's last name.

Following a jury verdict of guilt after two days of deliberation, Petitioner filed a motion for new trial based on newly discovered evidence. Petitioner also requested an order granting immunity based on information received following the trial by Petitioner's counsel that another client of counsel's had represented to him that he had arranged with Boxley on November 23, 1977 to receive the heroin which Boxley had in his car and with which possession Petitioner was charged and convicted.

In support of the motion for new trial based on newly-discovered evidence, Petitioner submitted an affidavit of one Edythe Lloyd. She stated that she had been living with Boxley in November, 1977, that she knew the circumstances of his and Petitioner's arrest, and that Boxley was driving to meet another person with the heroin when he came upon Petitioner and offered him a ride. The district court refused to grant a new trial based on that evidence, ruling that the testimony of Edythe Lloyd was discoverable prior to trial.

Based on the offer of counsel as to the unnamed client's testimony alone, the district court refused to grant the motion for immunity. Petitioner was sentenced on January 19, 1981 to the custody of the Attorney General for a period of ten years, with a special parole term of three years to follow incarceration.

A timely notice of appeal was filed from the judgment of sentence to the United States Court of Appeals for the Third

Circuit. By judgment order of December 3, 1981, the judgment of the district court was affirmed. By order of January 4, 1982, Petitioner's petition for rehearing *en banc* was denied.

REASONS FOR GRANTING THE PETITION

1. The right of an accused to confront witnesses against him is guaranteed by the Sixth Amendment to the United States Constitution. The importance of this right of confrontation has been stated on several occasions by this Court. *Greene v. McElroy,* 360 U.S. 474 (1955) and *Roviaro v. United States,* 353 U.S. 53 (1957). Additionally, in *United States v. Jackson,* 384 F.2d 835 (3d Cir. 1967), cert. denied, 392 U.S. 932 (1968), the Court of Appeals specifically approved a procedure to determine whether, when production of an informant is requested, that production is necessary to a fair determination of the cause, or is helpful to the defense, as was required in *Roviaro.* In *Jackson,* the informer himself was questioned *in camera* by the trial judge as to any testimony he could offer that might aid the defendant's cause. In other circuits, the courts have held that disclosure of the informant is required when the accuracy of the informant's information is in doubt or the information is the essence or core or main bulk of the evidence brought forth which would otherwise establish probable cause, *United States v. Johnson,* 467 F.2d 630 (2d Cir. 1972) and, one court has required that the government come forth to show that the informant's testimony would not be helpful to the defense. *United States v. McManus,* 560 F.2d 747 (6th Cir. 1977).

In this case, the information from the informant was directly contradicted by Attorney Jones. Additionally, the district court did no more than inquire as to the existence of the informant—that *in camera* proceeding is not what is intended by the constitutional provision for confrontation of witnesses against onself nor by the cases in the Third Circuit, other

circuits and this Court which have provided for confrontation of an informant when necessity for that testimony has been established. *Franks v. Delaware,* 438 U.S. 154 (1978).

2. Petitioner's original attorney initially represented the co-defendant Lucas Boxley. After Boxley was killed, that same attorney represented Petitioner. As Boxley's attorney, he possessed exculpatory information concerning Petitioner; Boxley made statements to him that Petitioner new nothing of the presence of the heroin in Boxley's car on the date of the arrest and that the heroin belonged only to Boxley. That counsel continued to represent Petitioner and never made that exculpatory information known. This conflict of interest denied Petitioner effective assistance of counsel, and additionally was a due process violation in depriving Petitioner of the right to have that information submitted to a grand jury prior to indictment. *United States v. Estepa,* 471 F.2d 1132 (2d Cir. 1972).

3. Trial counsel, following the verdict in this case, filed a motion for new trial based on newly discovered evidence. The district court ruled that that "newly discovered" evidence did not provide sufficient grounds for a new trial in that it was readily discoverable prior to trial by counsel. Such an admitted failure by trial counsel falls below the standard for effective assistance of counsel established by the Third Circuit—the exercise of the customary skill and knowledge which normally prevails at the time and place—and denied Petitioner his right to effective assistance of counsel at trial when that evidence was crucial.

4. Petitioner contends that this Court should review the standards established by the Third Circuit in *Government of the Virgin Islands v. Smith,* 615 F.2d 964 (3d Cir. 1980). That case held that the need for judicial immunity is triggered by the fact that the defendant is prevented from presenting exculpatory evidence which is crucial to his case. Under that standard,

Petitioner made a showing that crucial evidence from an unnamed person was being deprived him unless immunity was granted. However, because of the uncertainty of the law in this area, that information was denied him although Petitioner made a sufficient preliminary showing of the necessity of that information to his defense.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

ANDREW J. ACHMAN
SALLY A. FRICK

308 Frick Building
Pittsburgh, PA 15219
412/261-3340

Attorneys for Petitioner

Appendix

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 81-1415

UNITED STATES OF AMERICA

vs.

ANDERSON, CLARENCE STEWART aka Skeeter,
Clarence Stewart Anderson, *Appellant*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. CRIM. NO. 79-00030)

Submitted Under Third Circuit Rule 12(6)
December 3, 1981
Before: ALDISERT, ROSENN and WEIS, *Circuit Judges.*

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that (1) the court erred in refusing to require production of the informant, either *in camera* or at trial, where the information provided by the informant was directly contradicted by other testimony; (2) appellant was denied due process of law because of the delay between his arrest and the indictment in this case; (3) appellant was denied effective assistance of counsel: (a) where original counsel had a conflict of interest and possessed exculpatory information, neither of which were disclosed; and, (b) where trial counsel failed to fully investigate

and discover a witness who possessed information favorable to the defense; (4) the lower court erred in refusing to provide judicial immunity to a witness with evidence favorable to the appellant; and (5) appellant was denied due process where the court was presented with, and considered, unreliable and unsubstantiated information contained in the presentence report; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ ALDISERT
Circuit Judge

Certified as a true copy and issued in lieu of a formal mandate on January 12, 1982.

/s/ M. ELIZABETH FERGUSON

Test:
Chief Deputy Clerk, United States Court of Appeals For the Third Circuit

Attest:

/s/ SALLY MRVOS
Sally Mrvos, *Clerk*

Dated: December 3, 1981

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 81-1415

UNITED STATES OF AMERICA

vs.

ANDERSON, CLARENCE STEWART aka Skeeter,
Clarence Stewart Anderson, *Appellant*
(W.D. Pa. Crim. No. 79-00030)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and ALDISERT, ROSENN, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*.

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for hearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ ALDISERT
Judge

Dated: January 4, 1982

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three true and correct copies of the foregoing Petition for Writ of Certiorari were served upon the following by first class mail, postage prepaid, this 5th day of March, 1982:

Solicitor General
Department of Justice
Washington, D.C. 20530

ANDREW J. ACHMAN